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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 973.

ERLE R. LANE, C. A. RICHMOND, F. A. GODDARD and RALPH W. THOMAS, constituting the Creditors' Committee of Haytian Corporation of America,
Petitioners,

—against—

HAYTIAN CORPORATION OF AMERICA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HENRY M. WISE,
Counsel for Respondent.

On the brief:
JOHN W. KELLY,
FRANK J. PODESTA.

THE COURT PRESS, N. Y. C.

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Opinions Below.

The opinion of the Circuit Court of Appeals (R., pp. 255-266) is reported in 117 F. (2d) 216. The opinion of the District Court is reported in 33 F. Supp. 171.

Jurisdiction.

The judgment of the Circuit Court was entered on the 3rd day of February, 1941 (R., pp. 273-4). The jurisdiction of this Court is invoked under §240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. §347).

Statute Involved.

The pertinent statute involved is the Bankruptcy Act as amended, and particularly Chapter XI thereof. Sections 337(2) and 338 of said Act are set forth in Appendix A.

Statement.

On October 14, 1938, respondent filed a voluntary plan of Arrangement, for the adjustment of its outstanding unsecured debenture indebtedness, under Chapter XI, §322 of the Bankruptcy Act (R., fols. 565, 654). Thereafter and on December 5, 1938, the statutory meeting of creditors, provided for in §334 of the Bankruptcy Act was held (R., fol. 565). At this meeting a Committee of creditors (herein referred to as the Statutory Committee) was appointed pursuant to §338 of said Act (R., fol. 566). The individuals elected to serve upon the Statutory Committee were Erle R. Lane, C. A. Richmond, F. A. Goddard and Ralph W. Thomas, the petitioners herein (R., fols. 10, 11).

The first two of these members were nominees of a voluntary and informal debenture-holders committee, known in these proceedings as the "Hanson Committee" (R., p. 257, fols. 24, 660). The Hanson Committee was formed as early as August of 1936, more than two years prior to the filing of the petition for Arrangement by respondent (R., p. 263, fol. 24). Mr. Lane and Mr. Richmond had been actively associated with this committee from 1936 to the date of their election to the Statutory Committee (R., fols. 10, 23).

The remaining two members of the Statutory Committee, Mr. Goddard and Mr. Thomas were nominees of a second informal debenture holders' committee

known as the "Wales Committee" (R., p. 263, fols. 10, 11), and had been associated with said committee since its formation on October 27, 1938, two weeks prior to the first meeting of creditors (R., fol. 36).

On the day the Statutory Committee was elected, that Committee passed a resolution reciting the employment of the "Hanson" and "Wales" committees and the respective members thereof, as agents of the Statutory Committee, for the purpose of continuing negotiations with respondent; agreeing upon a final plan of Arrangement for respondent; soliciting assents to such plan; and taking any other action or steps deemed necessary for the purpose of securing the approval of such plan by debenture holders (R., p. 263, fols. 14, 567).

Respondent, on May 12, 1939, filed a second modified plan of Arrangement (R., p. 256, fol. 310). On July 10, 1939, a hearing before the Referee was duly held, for the purpose of considering and passing upon this second plan (R., fol. 340). On July 14, 1939, an order confirming this second modified arrangement was made by the Referee, who retained jurisdiction under the terms of said order to pass upon the propriety of all applications for allowances thereafter filed in these proceedings.

The order of confirmation was entered upon consent of all interested parties, including the attorneys for petitioners, and the time to appeal therefrom has expired (R., p. 259, fol. 370).

Petitioners on November 15, 1939, filed an application with the Referee, seeking an allowance in the sum of $16,263.44 (R., p. 257, fol. 575). This claim was based upon compensation to be paid to the individual members of the "Hanson" and "Wales" committees, and certain solicitors and employees re-

tained by said committees, and miscellaneous disbursements thereof (R., p. 257, fols. 20, 33, 35, 56, 60, 69).

On February 2, 1940, after a hearing held for the purpose of considering the aforesaid application, an order was made, in conformity with the formal decision of the Referee, denying the application of petitioners (R., fols. 373, 562, 609).

Respondent had subsequent to the entry of the order of confirmation on July 14, 1939, taken the necessary steps to complete the Arrangement, and on or about February 3, 1940, the Arrangement was consummated.[1]

Petitioners petitioned the District Court for a review of the adverse ruling of the Referee (R., fol. 613), and upon such review, the District Court reversed and remanded the proceedings to the Referee for the taking of proof as to the reasonable value of the services claimed to have been rendered by petitioners (R., fol. 672) (33 F. Supp. 171).

Upon appeal by respondent to the United States Circuit Court of Appeals, for the Second Circuit, that Court modified the order of District Court in so far as it affected petitioners and remanded the proceedings to the Referee "for further proceedings not inconsistent with this opinion". (R., p. 266) (117 Fed. (2d) 216, 221).

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[1] The order of confirmation was entered upon consent approximately ten months before, and the arrangement was consummated in fact approximately three months before, the decision of this Court in *Securities and Exchange Commission* v. *United States Realty and Improvement Company*, 310 U. S. 434, decided May 27, 1940.

Reason for Denial of Writ.

This Court in the exercise of its discretion, should deny the petition for certiorari because:

> The Circuit Court properly defined the status of a Statutory Committee in Chapter XI proceedings, and the nature and extent of the compensable services which may be rendered by agents of such Committee, and the decision of the Circuit Court is in accord with the applicable decisions of this Court.

POINT I.

The Circuit Court with due regard to the nature of Chapter XI as a composition statute, properly limited and defined the functions of the Statutory Committee, and the extent to which said Committee might compensate its agents.

Petitioners assert that the Circuit Court erred because that court unduly limited and restricted the functions of a Statutory Committee in Chapter XI proceedings, and improperly curtailed the activities of such Committee by limiting the items of service for which such Committee might compensate its agents (Pet., p. 7). Petitioners argue further that the Circuit Court by its decision has deprived Chapter XI proceedings of what petitioners term "an adversary character" and by so doing, seriously impaired the orderly administration of arrangement proceedings under said Chapter (Pet., pp. 7, 10).

Petitioners suggest that the proper construction to be placed upon Chapter XI, and particularly Section 338 thereof, would be one which would vest in the Statutory Committee the broad powers and rights enumerated on page 11 of the petition. The sweep-

ing powers listed in the petition would permit general creditor participation, through the Statutory Committee, in all matters affecting the formulation of the arrangement, the conduct of arrangement proceedings, and the administration of the estate and affairs of the debtor. It is obvious that when petitioners speak of imparting to Chapter XI proceedings "an adversary character", they mean granting to creditors through the medium of the Statutory Committee the right not only of participation in, but of practically absolute control over arrangement proceedings. Petitioners ask this court (Br., p. 18) to "define the function of the Arrangement Committee sufficiently broadly so as to permit the Committee to perform the functions set forth in the petition herein (p. 11)."

Respondent respectfully submits that the argument advanced by petitioners is untenable because:

(a) such argument is based upon a misconception of the true nature of composition or arrangement proceedings; (b) such argument overlooks entirely the fact that Congress, in enacting Chapter XI, retained the fundamental composition theory of Section 12 of the Bankruptcy Act of 1898, and accordingly designedly refrained from incorporating therein any provision for general creditor participation in such proceedings or for imparting to such proceedings "an adversary character" in the sense in which that term is employed by petitioners; (c) such an argument overlooks the fact that related bankruptcy legislation, namely, Chapters I to VII and Chapter X[2] of the

[2] On page 9 of the petition, after referring to certain of the provisions which give to Chapters I to VII and Chapter X an adversary character, petitioners make the following concession: "Chapter XI is singularly lacking in comparable provisions."

Bankruptcy Act as amended, contains detailed and comprehensive provisions for imparting to such proceedings "an adversary character", rendering particularly significant the omission of comparable provisions in Chapter XI; and (d) such an argument, if sustained, would require this court, by judicial construction, to read into Chapter XI provisions which do not appear therein and which were designedly omitted therefrom by Congress.

Composition proceedings were formerly governed by Section 12 of the Bankruptcy Act of 1898 and Section 74 of said Act, as amended (47 Stat. at L. Chap. 204, §74). (*In re Realty Associates Securities Corporation,* 69 Fed. (2nd) 41; certiorari denied, 292 U. S. 628.) Congress in enacting Chapter XI repealed these two former sections and they are now wholly superseded by Chapter XI. However, it is well recognized that Chapter XI was derived from, and retains, the basic features of these composition sections.[3]

Under Chapter XI an individual or corporate debtor may now submit to unsecured creditors an arrangement for the adjustment of the debts of such creditors upon any terms and for any consideration (§356). The arrangement which it is now possible to effect under Chapter XI is broader and more comprehensive than that which was available under §§12 and 74, and the procedure for consummating such arrangement has been refined and clarified. Nevertheless, whatever the terms of such an arrangement, it

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[3] See:

Weinstein—The Bankruptcy Law of 1938—A Comparative Analysis (p. 259 et. foll.);

Re Romec Pump Co., 31 Fed. Supp. 389, 390;

Securities & Exchange Commission v. *United States Realty & Improvement Co.,* 310 U. S. 434, dissenting opinion of Mr. Justice Roberts, p. 464.

remains basically similar to the old offer of composition to creditors and proceeds from an offer by the debtor upon fixed terms to settle and adjust his debts. Such an offer is submitted to creditors for their consideration, to be accepted or rejected by them.

This Court has, on several occasions, distinguished between composition proceedings under Section 12 of the Bankruptcy Act of 1898 and adversary bankruptcy proceedings. In *Nassau Smelting & Refining Works, Ltd.* v. *Brightwood Bronze Foundry Company,* 265 U. S. 269, Mr. Justice Brandeis, who delivered the opinion of this court, declared at page 271:

> "Composition is a settlement by the bankrupt with his creditors. In a measure, the composition supersedes, and is outside of, the bankruptcy proceedings. *Cumberland Glass Mfg. Co.* v. *DeWitt,* 237 U. S. 447, 454, 59 L. ed. 1042, 35 Sup. Ct. Rep. 636. It originates in a voluntary offer by the bankrupt, and results, in the main, from voluntary acceptance by his creditors. It cannot be confirmed unless there has been such acceptance by the requisite majority."

Again, in *Myers* v. *International Trust Co.,* 273 U. S. 380, this court declared at page 383:

> "It is settled by the decisions of this court in *Cumberland Glass Mfg. Co.* v. *DeWitt,* 237 U. S. 447, 453, 454, 59 L. ed. 1042, 1045, 35 Sup. Ct. Rep. 636, and *Nassau Smelting & Ref. Works* v. *Brightwood Bronze Foundry Co.,* 265 U. S. 269, 271, 273, 274, 68 L. ed. 1013, 1015, 1016, 44 Sup. Ct. Rep. 506, that a composition is 'a settlement of the bankrupt with his creditors',—in a measure superseding and outside of the bankruptcy proceedings,—which originates in a voluntary

> offer by the bankrupt, and results, in the main, from voluntary acceptance by his creditors; that the respective rights of the bankrupt and the creditors are fixed by the terms of the offer; and that upon the confirmation of the composition they get what they 'bargained for,' and no more."

The language employed by this Court in describing the nature of a composition in the two foregoing cases may accurately be employed in defining the true nature of an arrangement under Chapter XI. While an arrangement is pending before creditors for consideration, proceedings partake more of the nature of contractual negotiations than of an adversary litigation. By coming forward with a voluntary proposal of arrangement under Section 322, the debtor does not thereby submit his estate and affairs to the Court or the creditors for administration in bankruptcy. The debtor merely submits an offer upon such terms and conditions as the debtor may see fit to prescribe and the creditors can either accept or reject that offer.

It is true that if the proposed arrangement is thereafter withdrawn or abandoned by the debtor before acceptance, or is rejected by the creditors, the debtor runs a risk that the court may, under Section 376 of the Bankruptcy Act, adjudge the debtor a bankrupt and direct that bankruptcy be proceeded with under the general provisions of the Bankruptcy Act. Until this contingency has occurred, however, the proceedings are not truly adversary in character. Even in the case of pending bankruptcy proceedings a debtor may, before or after his adjudication, offer a plan of arrangement (§321), in which case the bankruptcy proceedings as such are suspended and consideration is given to the offer made by the debtor. The adversary bankruptcy pro-

ceedings are reinstated only if the arrangement is withdrawn or abandoned by the debtor, or rejected by the creditors (§376).

Arrangement proceedings under Chapter XI do not under ordinary circumstances contemplate the administration of the debtor's estate in bankruptcy, but merely provide a simple procedure by means of which an offer of settlement may be considered and acted upon by creditors, subject to confirmation of the court. There is, therefore, no valid reason for granting to creditors, through the medium of a Statutory Committee or otherwise, the general powers and rights enumerated on page 11 of the petition. Such a grant would be inconsistent with the nature and purpose of Chapter XI and in direct contravention to the express provisions thereof. If Congress had intended to bestow upon creditors in Chapter XI proceedings broad powers of participation and control, it could have done so by the employment of means and language similar to that used in the enactment of Chapter X.

That Congress did not so intend is indicated not only by the omission from Chapter XI of any provision creating such powers, but also by the careful statutory plan adopted by Congress to preserve and retain the debtor's control over such proceedings.

Chapter XI proceedings are initiated by the debtor through the filing of an arrangement modifying or altering the rights of unsecured creditors upon such terms and for such consideration as the debtor may see fit to offer (§356). The debtor may so initiate these proceedings whether a bankruptcy proceeding is pending (§321) or not (§322). Such proceedings cannot be initiated by anyone other than the debtor. Alterations or modifications in the proposed plan of arrangement may be made only by the debtor (§363).

No creditor or creditors' committee may offer or make any modifications in any plan of arrangement. Chapter XI contains no provision requiring the mandatory appointment of a trustee to take possession of the debtor's estate. On the other hand, although in the discretion of the court a trustee or receiver may be appointed, in most instances the debtor is allowed to remain in possession of his property and in control of his affairs subject to such conditions as may be imposed by the court (§342). Although the plan of arrangement is, of course, submitted to the creditors at a hearing called for the purpose of considering said plan (§§335, 336), the only creditor action which may be taken at such a hearing is the filing of acceptances to the plan or the noting of objections to the confirmation thereof. No provision is made for entertaining suggestions, alterations or modifications by creditors at this or any other hearing.

Acceptances to the plan may be obtained by the debtor either before or after the filing of the petition for an arrangement (§336(4)). It is conceivable, therefore, that if the debtor had obtained the requisite number of acceptances (§362), the arrangement could be confirmed at the very first meeting of creditors. If a majority of creditors accept the plan of arrangement and the court is satisfied that the provisions of Chapter XI have been complied with and that the plan is fair, equitable, feasible and in the best interests of the creditors, and that the arrangement has been proposed and accepted in good faith, the arrangement will be confirmed and bind all creditors affected by it (§366).

This court in *Securities & Exchange Commission* v. *United States Realty & Improvement Company,*

310 U. S. 434, in commenting upon the general nature of Chapter XI, stated at page 450:

> "Every phase of the procedure bearing on the administration of the estate and the development of the arrangement is under the control of the debtor."

At pages 18 and 19 of the petition, petitioners concede that Chapter XI does not contain provisions which impart to it an adversary character unless Sections 337(2) and 338 are liberally construed. It is difficult to conceive why Congress, if it intended arrangement proceedings to be adversary in character, and the Statutory Committee to be the vehicle for imparting such a character to these proceedings, would leave such an important phase of the legislation to implication to be spelled out from the two sections relied upon by petitioners, when Congress took such great pains to impart by appropriate provisions an unquestionable adversary character to Chapters I to VII and Chapter X of the Bankruptcy Act.

The statutory plan adopted by Congress in enacting Chapter X differs radically from that employed in Chapter XI. The principal object of Chapter X proceedings is not to consider a fixed offer of settlement made by the debtor, but rather to effect some plan of reorganization for the debtor whether it be sponsored by the creditors or the debtor or both. A petition for reorganization may be filed either by the debtor or the creditors (§126). Creditors, in the case where the debtor has instituted proceedings, may file answers contraverting the debtor's petition (§137). Provision is made under this Chapter for the disposition by trial of the controversial issues

raised by the creditors' answer (§§144, 145). In all cases where the amount of the indebtedness involved exceeds $250,000 the appointment of a Trustee is required (§156). The Trustee when appointed is given broad inquisitorial and visitatorial powers (§§167(1), (2), (3)) and must prepare and file a plan of reorganization or, if unable to do so, report the reasons why a plan cannot be effected (§169). Creditors are given the right to submit suggestions for the formulation of the plan (§169) and may submit modifications or amendments to the plans proposed by the Trustee, or may submit an entirely new plan (§§169, 222). Creditors are given the right of full participation in all proceedings had under this Chapter (§206) and may under certain circumstances be permitted to intervene as parties (§207). Provision is made for the intervention of the Securities and Exchange Commission as a party representing the interests of the public, and widely scattered creditors (§208). Broad provisions are made for compensation and allowances to be paid to such creditors as may appear and participate in the proceedings (§§216(3), 221(4)).

Under Chapter X, therefore, where the proceedings involve the administration of the debtor's estate, and go beyond the simple consideration of a plan offered by the debtor to his creditors, Congress properly vested full and adequate rights of participation and control in the creditor group and provided for the granting of compensation to such creditors as may have rendered services in connection with the conduct of the reorganization proceedings. That Congress did not do likewise under Chapter XI was not due to an oversight on its part, but rather to full realization of the radical difference in the nature of

the two proceedings. This Court, should not sanction any argument which requests it, as does the petitioners' argument in the present case, to revamp the entire statutory plan of Chapter XI and insert therein a right of creditor participation which does not logically belong there, and for which Congress did not provide.

In its opinion, the Circuit Court made the following statement (R., p. 264, 117 Fed. (2d) 220):

> "Though Chapter XI does amplify the former composition proceedings, nevertheless, it still proceeds as an offer by a debtor of a plan for the adjustment of his debts, and it can proceed in no other way. To aid the creditors in considering the offer a single creditors' committee may be appointed to advise, without compensation."

The committee to which the Circuit Court here referred was the Statutory Committee appointed pursuant to §338. This section provides in substance that if a creditors' committee has not already been appointed under the Act, the creditors at the first meeting may appoint a committee. Section 337(2) provides that the debtor shall be required to pay the administration cost and expenses incurred in the proceedings, and in connection with the arrangement by the Committee of creditors so appointed, and the agents or attorneys for such Committee.

It is to be noted that under §338 the appointment of the Statutory Committee takes place after the plan of arrangement has been proposed by the debtor. When the Statutory Committee is appointed therefore, it has before it for consideration a concrete proposal which only the debtor can alter, modify or

change. So far as the creditors are concerned, and in the absence of consent on the part of the debtor, the original proposal must be accepted or rejected. It has been pointed out that under these circumstances the role of the creditor in Chapter XI proceedings is a comparatively passive one. The Circuit Court in keeping with the true status of creditors in Chapter XI proceedings held that the function of a Statutory Committee was primarily advisory, and that the Statutory Committee corresponded to the committee authorized by Section 44 (b) in ordinary bankruptcy proceedings (R., p. 264).

Section 338 states that a committee may be appointed if one has "not already been appointed under the Act". The only possible committee to which this could have reference is one appointed under Section 44 (b) of the Bankruptcy Act. Two District Court decisions have so construed this section (*Re Max Fishman, Inc.,* D. C. N. Y. 27 Fed. Supp. 33 and *Re Credit Service, Inc.,* D. C. Md. 31 Fed. Supp. 979).

Petitioners argue that if the Statutory Committee be deemed to correspond literally with a committee appointed under Section 44 (b), then the activities of such committee would be limited to "submitting to the court any question affecting the administration of the estate" since the two remaining statutory functions of the committee appointed under Section 44 (b) presuppose the existence of a trustee (Pet., p. 14). It is respectfully submitted that such is not a proper interpretation of the Circuit Court's opinion. The Circuit Court did state the Statutory Committee corresponded to a "44 (b) committee". This statement does not mean that the two committees were one and the same, or that their functions were literally the

same. The Circuit Court's opinion can fairly be interpreted to mean only that the Statutory Committee was of the same general character as the 44 (b) committee which is essentially an advisory committee.

In keeping with its ruling that the Statutory Committee represented the creditors and not the debtor, the Circuit Court properly denied compensation to any agents of the Statutory Committee for solicitation of assents to the proposed plan (R., p. 265). Such services are not services performed in furtherance of the Committee's duty to advise the creditors with respect to the debtor's arrangement, or to aid creditors in passing judgment thereon, but are services rendered primarily in the interest of promoting the debtor's plan.

Throughout the petition, and particularly on pages 17 and 18 thereof, petitioners stress the fact that if arrangement proceedings are not made adversary in character the door will be opened to "extensive fraud and chicanery". This fear of petitioners is wholly unfounded. No arrangement proceeding can be confirmed until the Court is first satisfied that the provisions of Chapter XI are complied with, that the arrangement is fair, equitable and feasible and in the best interests of creditors, and that its proposal and acceptance have been made in good faith and not procured by any means, promises or acts forbidden by the Bankruptcy Act. Moreover, it must be shown to the satisfaction of the Court that the debtor has, not been guilty of any acts, or failed to perform any of the duties which would be a bar to the discharge of a bankrupt (§366).

Adequate provision is made under §386 for the setting aside of an arrangement upon the application of any party in interest within six months after such

arrangement has been confirmed, where fraud has been found to exist.

Appropriate provisions are contained in §376 for forcing of the debtor into bankruptcy where the arrangement is withdrawn or abandoned by the debtor or rejected by the creditors. Moreover, under the administration of the courts, composition proceedings have been successfully conducted for many years prior to the enactment of Chapter XI under statutes wholly lacking the adversary character which petitioners now insist should be given by this Court to Chapter XI, although Congress did not so provide. There is no reason now to anticipate the sudden introduction of "fraud and chicanery" into Chapter XI proceedings.

It may well be that the petitioners' attempt to recast Chapter XI, and to cloak it with an adversary character similar to that of Chapter X is prompted by a desire to adapt Chapter XI to a situation which it may not have been originally designed to cover.

The Circuit Court commented upon this phase of the case (R., p. 258, 117 F. (2d) 218) in the following manner:

> "Had these proceedings occurred after the Supreme Court had clarified the procedure and explained the limitations of Chapter XI proceedings in *Securities & Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293, it seems clear that this company in all probability would have been reorganized under Chapter X, 11 U. S. C. A. §501 *et seq.*, not 'arranged' as here, and that these various committees would have been spared the disappointment which is now theirs."

As pointed out at page 4 of this brief, the order of confirmation was entered upon consent approxi-

mately ten months prior to the aforesaid decision of this Court, and the arrangement was finally consummated three months before that decision was rendered. Accordingly, the Circuit Court properly decided (R., p. 259, 117 Fed. (2d) 219)

> "however, much we may sympathize with them in a situation which seems to have developed because of the laws' uncertainties, clearly we must treat the proceedings as legally under Chapter XI, and controlled by the provisions of that chapter."

Petitioners cannot properly, even to alleviate what may appear to be a legal hardship, request this Court to completely change the nature of Chapter XI so that these petitioners may have relief which might have been available to them under Chapter X.

POINT II.

The Circuit Court properly denied compensation to petitioners based upon services rendered by informal committees prior to the appointment of the Statutory Committee.

As one of the grounds urged for the granting of the writ herein, petitioners in Point II of their brief (p. 20) assert that the Circuit Court erred in promulgating the general rule that expenses incurred prior to the appointment of the Statutory Committee are not allowable. It is true that the Court in its opinion made the following statement (p. 221):

> "* * * We think expenses incurred prior to the Committees' appointment are not allowable, since they are designed to facilitate advance acceptance

of the plan rather than to aid impartial judgment upon it."

The Circuit Court, however, denied the petitioners' application for compensation in so far as it was based upon services rendered by the "Hanson" and "Wales" committees prior to the appointment of the Statutory Committee, upon the ground that such services were in fact rendered with the intention of facilitating advance acceptance of the plan (R., p. 258). The Circuit Court points out that the Statutory Committee in accepting the prior services of the "Hanson" and "Wales" committees adopted the view of the debtor, and supported the same against general creditor interests (R., p. 265). Any argument based upon what may be the proper disposition of various types of services which may be rendered before the Statutory Committee's appointment, such as appears in petitioners' brief at page 20, becomes academic in view of the specific finding by the Circuit Court that in this particular case the prior services were designed to facilitate advance acceptance of the plan.

However, the general rule adopted by the Circiut Court is itself wholly proper without regard to the particular circumstances of the present case. Section 337 (2) in providing that the Statutory Committee might be compensated for the expenses of its agents, reasonably contemplated that such agents would be appointed and would render their services after the appointment of the Statutory Committee, and after the debtor had submitted a definite plan of arrangement (*Re Max Fishman, Inc.*, D. C. N. Y. 27 F. Supp. 33).

As a practical matter, it is hardly likely that services performed before the appointment of the

Statutory Committee, would be services motivated by an intention to aid such Committee when formed, in the performance of its function of advising creditors and assisting such creditors to formulate their judgment with respect to the arrangement. It is far more likely that such services would be motivated by the purpose suggested by the Circuit Court.

Chapter XI contains no language recognizing any creditor activity prior to the appointment of the Statutory Committee, nor is it possible that there should be any proceedings whatsoever until the same had been initiated by the debtor's filing of an arrangement. If Congress had intended that services might be rendered prior to the appointment of a Statutory Committee, and the debtor thereafter be compelled to pay for the same, it is again likely to suppose that appropriate language would have been included in Chapter XI.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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